UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GADECATUR SNF LLC dba EAST LAKE ARBOR, Employer and RETAIL, WHOLESALE & DEPARTMENT STORE UNION-SOUTHEAST COUNCIL Petitioner	Case 10-RC-249998

GADECATUR SNF LLC REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to Section 102.69(c)(2) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), GADecatur SNF LLC d/b/a East Lake Arbor ("Employer" or "Lake Arbor") hereby requests that the Board review the Acting Regional Director's ("ARD") February 4, 2020 Decision and Certification of Representative. (Exhibit A). For the reasons set forth below, the Decision and Certification of Representative should be vacated, the results of the November 12, 2019 election set aside, and a new election ordered.

INTRODUCTION

The Petition in this case was filed on October 15, 2019 by Retail, Wholesale & Department Store Union – Southeast Council ("Petitioner" or "Union"). Pursuant to a Stipulated Election Agreement between the parties, an election was conducted at Employer's Lake Arbor location in Decatur, Georgia on November 12, 2019 in the following unit:

> All regular part-time and full-time employees including CNA's, LPN's, Activity and Maintenance employees employed by the Employer at its facility located at 304 5th Avenue, Decatur, Georgia, excluding all other employees, office clerical employees, manager, guards, and supervisors as defined in the Act.

The Tally of Ballots showed that of forty-eight (48) eligible voters, twenty-two (22) cast valid votes for the Petitioner and seventeen (17) cast valid votes against Petitioner. Four (4) ballots were challenged. Thus, approximately five (5) eligible employees (comprising 10% of the eligible voters) did not vote. The Employer filed timely Objections to conduct affecting the election, a copy of which was served on Petitioner. On November 26, 2019, the Acting Regional Director issued an Order Directing Hearing and Notice of Hearing on Objections.

On December 20, 2019, the Hearing Officer issued her Report on the Employer's Objections (Exhibit B), in which she recommended the Employer's Objection be overruled. The Employer filed Exceptions to The Hearing Officer's Report on Objections on January 15, 2020. On February 4, 2020, the ARD issued her Decision and Certification of Representative, adopting the Hearing Examiner's Report, including strained analyses and incorporating the Hearing Examiner's errant and subjective application of established Board law.

THE EMPLOYER'S OBJECTION

The Employer's Objection centers on the conduct of five (5) clearly identifiable Union representatives, including at least two (2) Union officers known to eligible employees, who entered the Employer's premises without authorization and fomented a loud, hostile, and disturbing ruckus immediately outside the sole entrance to the polling place while the polls were open. This disturbance began when Union agents escorted a former employee, Tabitha Martin, into the Employer's facility while the polls were open and without authorization.

Ms. Martin had been terminated a few weeks earlier for her own opprobrious conduct, screaming obscenities and expletives in front of other employees and residents of the Employer's skilled nursing facility. For this reason, the Employer denied Ms. Martin access to its facility moments earlier. It is uncontested that the Employer did so pursuant to its standard policy that

former employees are not allowed to enter the premises. It also is uncontested that none of the Union agents attempted to control Ms. Martin as they accompanied her into the Employer's facility. To the contrary, the Union agents facilitated Ms. Martin's entrance, entered with her while the polls were still open, provoking a confrontation with members of management.

The Union agents and representatives then escorted Ms. Martin to the voting area and stood outside its entrance, blocking passage to the room and effectively preventing eligible voters from casting a ballot. Thus, Petitioner not only enabled Ms. Martin's disruptive conduct, it then escalated the disruption, by not only blocking the voting area, but also causing a cacophony loud enough to be heard by eligible voters on both floors of the Employer's facility.[1]

These facts were uncontested but, incredibly, were minimized and ignored by the ARD who substituted her own erroneous conclusions rested on a re-interpretation of established Board law and her own unsupported, subjective version of the facts. In reaching those conclusions, the ARD misapplied Board law by misinterpreting the standards established in *Avis Rent-A-Car*, 280 NLRB 580, 581 (1986) and related Board precedent.

STATEMENT OF FACTS

The physical configuration of Lake Arbor provides the foundation for assessing the Union's misconduct and for appreciating how the ARD objectively erred in failing to conclude Petitioner's misconduct reached and reasonably tended to impact eligible employees.

Lake Arbor is a skilled nursing facility that employs approximately 86 (eighty-six) employees.[2] (Tr. 15:17-18; 16:4-5). The facility has two floors. (Tr. 16:6-7). The first floor is

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[1] As stated by the Hearing Officer, though the Objection appears to allege third-party misconduct, the Employer clarified its position on the record, stating that the issue is the Petitioner's alleged misconduct during the final polling session.

[2] Lesly Gervil has served as the Administrator of Lake Arbor (the "facility") for almost two (2) years. (Tr. 15:19-22). In his position, Mr. Gervil is the highest-ranking individual at the facility and is responsible for managing the day-to-day operations. (Tr. 15:23-25; 16:1-2).

bisected by a main hallway used by employees and residents. (Employer Ex. 1; Tr. 16:19-21). This first-floor hallway runs from one end of the facility to the other. (Employer Ex. 1; Tr. 17:11-21). The path from one end of the first floor to the other, necessarily traverses the hallway. (Employer Ex. 1; Tr. 17:19-21). The hallway is approximately fifteen (15) feet wide. (Employer Ex. 1; Tr. 43:2-4). It is undisputed that there is an unobstructed view from one end of the hallway to the other. (Employer Ex. 1; Tr. 109:21-25).

The facility's first floor nursing station is located at one end of the hallway. (Employer Ex. 1; Tr. 19:25-20:1-4; Employer Ex. 4). The Administrator's office is on the other end of the hallway. As one moves down the hallway from the office, on the right side of the hallway there is a short hallway that leads to the facility's only employee breakroom. (Employer Ex. 1: Tr. 19:7-8; 13-14). Next to the entrance to the hallway are the stairs to the second floor. Across from the hallway to the break room and the bottom of the stairs is a conference room that served as the polling area during the November 12, 2019 election. (Employer Ex. 1: Tr. 18:3-13). On election day, a sign was posted on the wall outside of the conference room designating it as the official polling place. (Employer Ex. 1; Tr. 21:2-12).

The main entrance to the facility also is situated on the hallway. (Employer Ex. 1; Tr. 17:14-20). Directly across from the main entrance is the receptionist's area. (Employer Ex. 1; tr. 18:24-25 – 19:1, 30:15-17). Id. Providing some linear perspective, the main entrance is approximately twenty (20) feet from the polling area. (Employer Ex. 1; Tr. 19:21-23).

The polling area was in a conference room accessed through a single door from the main hallway. The door is visible from the nursing station. (Employer Ex. 1; Tr. 18:14-20; 19:25-20:6). There is a single employee breakroom. (Tr. 19:8-9, 13-14). As noted, the hallway leading to the breakroom is directly across from the door to the polling area. (Employer Ex. 1; Tr. 19:2-8). In

sum, any employee walking to or from, or standing at the nursing station, can see the entrance to the polling area. Any employee walking into or out of the break room or congregating at the doorway can see the entrance to the polling area. The only stairway connecting the first and second floors is situated along the main hallway across from the door to the polling area. It is uncontested that noises, particularly loud noises, can be heard on both floors through the staircase.

The election took place at the facility on November 12, 2019 during two (2) voting periods. (Tr. 29:14-20). The first voting period occurred between 6:00 AM and 8:00 AM. *Id.* The second voting period occurred between 2:00 PM and 4:00 PM. *Id.* Mr. Gervil was present at the facility during voting times and remained in his office to avoid the polling area. (Tr. 29:21-30:4). At approximately 3:45 PM, the facility's receptionist paged Mr. Gervil, who was in his office with the Employer's attorney John Chobor ("Chobor"). The receptionist notified Mr. Gervil that a discharged employee was trying to access the facility. (Tr. 30:20-24; 31:21-23; 45:21-24). The Employer's general practice is to not allow discharged employees to enter the facility or the Employer's premises. (Tr. 78:9-17). Messrs. Gervil and Chobor left Mr. Gervil's office to identify the discharged employee and prevent them from entering the facility. (Tr. 30:25 – 31:5). They walked down the main hallway towards to the main entrance where they encountered Ms. Martin, who was yelling and screaming that she should be allowed to vote and threatening to call the Petitioner's agents. (Tr. 31:1-4, 16-20; 39:1-7; 54:7-14). Mr. Gervil told Ms. Martin that she must leave the premises because of the nature of her discharge. (Tr. 31:25 – 32:1-3). Ms. Martin left the facility, and Messrs. Gervil and Chobor returned to Mr. Gervil's office. (Tr. 31:7-10).

Around 3:50 PM, Mr. Gervil received another page from the receptionist informing him Ms. Martin was attempting to reenter the facility. (Tr. 32:11-16; 33:1-5). Once again, Messrs. Gervil and Chobor left Mr. Gervil's office and walked down the main hallway towards the main

entrance. (Tr. 32:17-20). They encountered Ms. Martin in front of the receptionist area, but this time she was accompanied by at least five (5) of Petitioner's agents wearing Petitioner-labeled jackets, including Union President James Shackelford and the Union's Secretary-Treasurer. (Tr. 32:21-24; 34:2-3; 35:8-11, 22-25, 92, 115). Ms. Martin and the Petitioner's agents were demanding loudly that Ms. Martin be allowed to vote. (Tr. 32:21-25). Messrs. Gervil and Chobor encountered Ms. Martin and Petitioner's agents in front of the reception area in the middle of the main hallway and asked that she and Petitioner's agents leave the premises. (Tr. 35:12-25).

Ms. Martin and the Petitioner's agents refused to leave and instead caused a loud disruption in the usually quiet facility. (Tr. 39:16-23). The disruption was so great that several eligible voters came to identify the source of the loud commotion. (Tr. 36:8 – 37:9). In fact, eligible voters from the second floor came down to the first floor of the facility to witness the altercation. (Tr. 40:5-14).

Petitioner's agents refused to leave the premises; demanding Ms. Martin be allowed to vote. (Tr. 74:6-11). Petitioner's agents migrated towards the door to the polling area during the altercation. (Tr. 79:1-13). It is undisputed that Petitioner's agents moved *directly* in front of the door to the polling area, during the voting period, continuing to demand Ms. Martin be allowed to cast a ballot. (Tr. 79:11 – 80:1; 113:4-7). This loud, disruptive altercation in the main hallway between the representatives of the Employer and the Petitioner lasted at least five (5) minutes, but both Employer and Petitioner witnesses testified that the altercation could have lasted as long as ten (10) minutes. (Tr. 33:1-5; 42:3-5; 112:14-22). It is uncontroverted that (1) the first-floor main hallway is relatively narrow; (2) the altercation blocked most of the hallway; and (3) the altercation would have been visible to anyone in the hallway. (Tr. 109:10-25). This includes the nursing station and any employee accessing the hall to the dining room or employee breakroom. (Tr. 19-

20). In order to deescalate the disruption, the Employer agreed to let Ms. Martin vote subject to challenge. (Tr. 59:18-25).

STATEMENT OF ARGUMENT

A. INTRODUCTION

The ARD committed two fundamental errors when she overruled the Employer's objections and certified the Union. First, she inexplicably imposed on the Employer the burden of proving that potential voters were adversely affected by the Union's misconduct. Second, she failed to accord proper weight to the consequences of the Union's disruption of the voting process.

The ARD cited the foundational precept of election law, and then proceeded to ignore it. She properly observed that, "To prevail, the objecting party must establish facts raising a 'reasonable doubt as to the fairness and validity of the election.' *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970)" The standard of proof is "reasonable doubt" and the Employer should not be compelled to prove more than that. Yet, the ARD consistently imposed on the Employer the burden of affirmatively establishing additional facts pertaining to matters that were either uncontested or subject to reasonable inference.

The result of the ARD's errant analysis was to distort the standards for evaluating election objections announced in *Avis Rent-a-Car*, supra. at 581.[3] The ARD's decision demands far more than "reasonable doubt;" it demands proof beyond a reasonable doubt. Effectively, the ARD demands that even uncontested testimony be corroborated, a mystifying and perverse interpretation of evidentiary principles.

[3] The Employer's citation to *Avis Rent-a-Car* should not be construed as an endorsement of slavish adherence to the nine-part test adopted by the Board in that case. The Employer submits that this test is not necessarily entirely consistent with the "reasonable doubt" standard articulated in *Polymers, Inc.* In any event, reducing the *Avis-Rent-a-Car* guidance to a numeric comparison, as the ARD has done here, is unjustifiably formulaic.

Ultimately, the procedures for the conduct of elections are designed to ensure that the outcome reflects a free and fair choice of the voters. The Board's goal is to conduct elections "in a laboratory under conditions as ideal as possible to determine the uninhibited desires of employees" and to provide "an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasonable choice." *Sewell Mfg. Co.*, 138 NLRB 66, 70 (1962). Further, the Board is "especially zealous in preventing intrusions upon the actual conduct of its elections." *Claussen Baking Co.*, 134 NLRB 111, 112 (1961).

These pronouncements by the Board are not merely platitudes to be rotely recited in every context. This case involves a seminal intrusion on the actual conduct of an election. Here, the ARD erred in failing to find the "laboratory conditions" required by the Board in election proceedings were destroyed by Petitioner's agents. "[T]he proper test for evaluating conduct of a party is an objective one – whether it has 'the tendency to interfere with the employees' freedom of choice.'" *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001). The issue is not whether a party's conduct in fact coerced employees, but whether the misconduct *reasonably tended to interfere* with the employees' free and uncoerced choice in the election. *Baja's Place,* 268 NLRB 868 (1984) (emphasis added).

The ARD fully ignored this standard, demanding impossibly subjective evidence and summarily dismissing the undisputed and overwhelming objective evidence that the disruption in the hallway reasonably tended to interfere with the results of the election, and almost certainly reasonably tended to dissuade at least one or more eligible voters from voting.

B. THE ARD MISAPPLIED THE EXISTING STANDARD

Under existing Board law, in determining whether a party's conduct has the tendency to

interfere with employee free choice, the Board considers the following nine (9) factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the part against whom objections are filed. *Taylor Wharton Division,* 336 NLRB at 158, citing *Avis Rent-a-Car,* supra.

The ARD reduced these nine factors to a mathematical exercise. She (erroneously) added together the factors she perceived to favor the Employer and those which were averse to the Employer, tabulated and compared the results. But the Board has not historically, and should not now, endorse so rigid an application of its test. Logically, every factor identified in *Avis* in every case cannot carry precisely the same weight. Indeed, in some contexts, certain of the factors may not be applicable at all. The Employer submits that when properly weighed and objectively judged, the factors lead inexorably to the conclusion that the election must be re-run.

Consideration of the first two *Avis* factors demonstrates the problem with numerical compilation. The crux of the Employer's argument rests on one incident. However, that incident was so severe as to warrant special consideration. The Union representatives entered the facility during voting time, congregated immediately outside the polling room, and effectively blocked the entrance to the room. Moreover, they engaged the Employer in a loud and hostile exchange which, according to uncontroverted testimony, could be heard throughout the building. The incident

occurred in close proximity to at least two primary areas where eligible voters would be situated: the first-floor nurse's station, and the breakroom. Each area was within the direct line of sight of the confrontation.

The ARD dismissed these facts too cavalierly. She found the incident was not severe because of its relatively short duration. However, it is not the duration of the incident, but its intensity that made it severe. The incident blocked ingress to the polls in the critical minutes before the voting was to end. Given that ten percent of the bargaining unit did not vote, the barrier to voting the Union erected introduced a reasonable doubt concerning the ability of eligible employees to vote. But the ARD opined that employees would not have been in fear from the incident. She offered no support for the subjective belief other than the fact that the subject of the confrontation was eligibility of a voter. This subjective leap defies logic. First, a loud, public argument among eight people blocking a hallway, objectively viewed, is fear-inducing. Second, the potential voter would not likely even be aware of the context of the confrontation before being dissuaded from approaching to vote. Third, the issue of eligibility to vote would have been foremost on the minds of potential voters who would have been disinclined to enter the fray if another potential voter's eligibility was being questioned in a loud and hostile manner.

The ARD's evaluation of the third *Avis* factor is critically flawed. Effectively, the ARD imposed on the Employer the burden of adducing evidence to transcend the already uncontroverted testimony of Administrator Gervil. The ARD concluded that the Employer failed to establish the exact number of employees in the bargaining unit subjected to the misconduct. Yet, the first-floor hallway is the main thoroughfare of the facility. It is uncontroverted that (1) the first-floor main hallway is relatively narrow; (2) the altercation blocked most of the hallway; and (3) the altercation would have been visible to anyone in the hallway. (Tr. 109:10-25). This includes the nursing

station and any employee accessing the hall to the dining room or employee breakroom. (Tr. 19-20). Indeed, all witnesses agree that the altercation was visible from the nursing station at other end of the hallway, where several eligible voters routinely performed work tasks. Moreover, the record establishes that the disruption was so great several eligible voters came to identify the source of the loud commotion. (Tr. 36:8 – 37:9). In fact, eligible voters from the second floor came down to the first floor of the facility to witness the altercation. (Tr. 40:5-14).

The ARD inexplicably dismissed this overwhelming testimony because the record does not contain actual names of employees who witnessed the altercation. But this level of precision was unnecessary when the fact was uncontested that the confrontation affected the entire facility. Given that ten percent of the bargaining unit did not vote, it is reasonable, indeed appropriate, to infer that at least some of these prospective voters were subjected to the Union's misconduct. A contrary conclusion would defy logic and commonsense. The ARD's adoption of the Hearing Officer's failure to credit this testimony is an egregious error, one that colors the ARD's entire analysis of the incident.

The tally of the ballots demonstrates the importance of giving credence to the Employer's argument that employees were subjected to the Union's misconduct. One vote would have been sufficient to change the result of the election. Therefore, if only one prospective voter was dissuaded by the incident from voting, the precise number of other employees subjected to the misconduct becomes significantly less salient. The decision represents a classic case of "failing to see the forest for the trees." A veritable forest of employees must have been subjected to the incident. The ARD erred by focusing narrowly only on names. The ARD's decision deprives the Employer of the inherent credibility of Administrator Gervil's testimony[4].

[4] The ARD joined the Hearing Officer in declining to credit Gervil's testimony on purely subjective grounds. Although the testimony was uncontroverted the Hearing Officer and ARD dismissed it as vague, uncorroborated, and

The fourth *Avis* factor weighs most heavily in the Employer's favor. The incident at issue was not just proximate to the election, it was during the election. The ARD tallied this factor in the Employer's favor but discounted its significance, finding it was outweighed by other factors. However, if the period between the filing of the petition and the election is "the critical period," the duration of the election itself must be a level above "critical." The disruption caused by the Union did not simply mar the critical period, it happened during the election immediately outside the voting room. If the sanctity of the election process is paramount, the sanctity of the situs of the election must be as well. Blocking ingress to the voting room during the election is as proximate to the election as is physically possible.

The ARD appears to adopt the Hearing Officer's dilution of the impact this incident had on the election by focusing on the duration of the incident. If, as appears from the record, the incident occurred ten minutes before the polls closed, this fact does not diminish its significance. Ten minutes is ample time for eligible voters to cast ballots. Anyone in line at the time the polls closed would have been permitted to vote. Even one potential voter turned away by the incident could have altered the election outcome. The presence of a loud hostile gathering of eight people immediately adjacent to the polling room constituted a virtually impenetrable barrier to potential voters. Therefore, the temporal limitation of the incident does not justify dismissing the factor of proximity.

The ARD erred in giving less weight or even equal weight to the proximity factor in evaluating the Employer's objection. Particularly in the context of this case, the fact that the incident at issue occurred during the election at the entrance to the polling room should have been weighted heavily in the *Avis* analysis applied by the ARD.

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non-specific. In the absence of any countervailing evidence, the Hearing Officer and ARD had no objective basis to discredit Gervil. The failure to credit his testimony is a fundamental error.

The fifth factor in the *Avis* analysis is the degree to which the incident persisted in the minds of employees in the voting unit. This is a factor ill-suited to an event that occurred during the election. To be salient, the incident needed to persist only for a few fleeting minutes until the polls were closed. However, those few fleeting minutes were fraught with conflict and hostility. The conflict was audible throughout the building. Eligible voters viewing the commotion from the hallway, would have been induced to avoid the area. Therefore, to the extent this factor is even weighed in the analysis, it must be weighted heavily in the Employer's favor. Again, it is not the temporal span of the incident, but the intensity of it that is critical.

The ARD wrongly adopted the Hearing Officer's conclusion that the Employer failed to prove dissemination of the Union's misconduct, the sixth *Avis* factor. The ARD's rejection of the Employer's argument for dissemination has dual aspects. First, the Hearing Officer and the ARD assumed lack of dissemination because the incident occurred near the end of the voting session. Second, the Hearing Officer and the ARD concluded the Employer failed to satisfy the putative burden of naming employees among whom the incident was disseminated.

In one sense, the question of dissemination misses the point entirely. The vote tally was sufficiently close that one vote could have altered the outcome of the election. Therefore, if even one eligible voter was dissuaded from voting by the fracas, any further dissemination would have been superfluous. Where, as here, ten percent of the bargaining unit did not vote, it is reasonable to conclude that at least some voters were blocked from casting their ballots by the heated confrontation in front of the polling room. Thus, the value of dissemination as a factor to weigh in the analysis of the Employer's objection is significantly diminished. In *Peppermill Hotel Casino*, a representation election between the company and the union ended in a tie. 325 NLRB 1202, 1203 (1998). Even though the Board did not find that the conduct at issue was widely

disseminated within the small voting unit, the Board found that the outcome of the election could have been influenced by just one (1) change in the vote of any eligible voter who witnessed the misconduct. *See Id.* at 1208.

In any event, the record is replete with evidence of dissemination. It is undisputed that any employee walking to or from, or standing at the nursing station, can see the entrance to the polling area. Any employee walking into or out of the break room can see the entrance to the polling area. It is also undisputed that the disruption was so great several eligible voters came to identify the source of the loud commotion. (Tr. 36:8 – 37:9). In fact, eligible voters from the second floor came down to the first floor of the facility to witness the altercation. (Tr. 40:5-14).

The evidence adduced by the Employer was enough to establish dissemination. The ARD cites no authority requiring the Employer to name each employee who may have heard the commotion. The Employer's witness was embroiled in the heated exchange and cannot be expected to have singled out individual employees as witnesses to the incident, nor is such level of detail required. To the extent dissemination factors into the analysis in the context of this case, the Employer proved the dissemination was widespread. The ARD erred in failing to so find.

The seventh and ninth *Avis* factors both measure aspects of the Employer's involvement in the objectionable conduct. The seventh factor weighs the effect of misconduct by the Employer to "cancel out" misconduct by the Union. This factor presupposes the Employer engaged in any misconduct. In this case the Employer did nothing more than enforce its policy against terminated employees entering the facility. By contrast, the Union massed its agents at the entrance to the facility, entered the corridor where the voting was taking place, blocked the entrance to the voting room and precipitated a loud and hostile exchange with representatives of the employer who appeared solely in response to the Union's efforts at confrontation.

The Employer's "contribution" to the melee was merely a response to extreme provocation by the Union trespassers. That response did not "cancel out" the effects of the Union's disruption of the election process. The ARD concluded that the Union acted in response to the Employer's putative refusal to let an eligible employee vote. However, the individual in question had been terminated before the election and was no longer an eligible voter. Whether her status was placed in question by a contemporaneously filed unfair labor practice charge is immaterial to the Union's action in sending a mob of agents to escort the individual in question directly into the polling area. Simply put, the Employer's actions did not disrupt the conduct of the election at the very room where the voting was taking place, while the Union's conduct directly and seriously impaired the laboratory conditions for the final minutes of voting. *See Baja's Place,* 268 NLRB at 868.

The ARD erred in upholding the Hearing Officer's finding that representatives for the Employer and the Petitioner "engaged in the same potential misconduct." The Hearing Officer failed to consider that the Employer's representatives asked the Petitioner's agents leave the premises. When Petitioner's agents refused to leave, they essentially became trespassers. Petitioner's refusal to leave the premises when requested created the appearance that the Employer "was powerless to protect its own legal rights in a confrontation with the Union." *See Philips Chrysler Plymouth*, 304 NLRB 16 (1991).

The ARD sought to distinguish the *Phillips Chrysler Plymouth* case on its facts. The mere differences in peripheral facts does not diminish the significance of the holding in *Phillips Chrysler Plymouth* or its applicability to the instant case. Here, as there, the Union agents were trespassers on the Employer's premises, and here, as there, the Employer was unable to bar them from the premises or remove them. Although here the Union agents engaged in no electioneering, they fomented a confrontation that blocked ingress to the voting room, arguably a more serious

transgression. It is true that here the police were not called but it is also true that this incident involved five agents of the Union rather than the two involved in *Phillips Chrysler Plymouth*. Thus, it cannot be said that the situation in that case was more egregious than the situation in the instant case.

The ARD wrongly foisted blame for the incident onto the Employer and wrongly concluded that Employer misconduct "canceled out" the Union's misconduct. The fact remains that the Union chose confrontation over process. The Union had procedural mechanisms for handling their dispute over eligibility, but they chose instead to enter the facility en masse and force the issue while the election was still proceeding and in a manner that obstructed access to the voting room in full view of potential voters. The ARD erred in assigning outsize significance to the seventh and ninth *Avis* factors.

The ARD did tacitly weigh the eighth *Avis* factor, the closeness of the vote, in the Employer's favor. However, once again the ARD declined to afford this factor its proper importance. One vote could have altered the outcome of the election. One voter discouraged or constrained from voting by the Union's misconduct could have changed the result. The Board has ordered a rerun in circumstances where a party's misconduct may have affected the outcome of a close election. *See Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (emphasizing misconduct could have affected election decided by one vote); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (2000) (finding that instances of objectionable conduct "could well have affected the outcome of the election" in setting aside election)[5]. Therefore, the ARD should have accorded this factor

[5] The ARD attempted to distinguish the two cited cases on the ground that the Employer allegedly failed to provide sufficient evidence that eligible voters witnessed the altercation. As noted infra., contrary to the ARD, the record establishes that eligible voters must have witnessed or at least have been aware of the incident and been dissuaded from voting as a result. For the reasons stated above, the burden the ARD places on the Employer is unreasonable and inconsistent with evidentiary principles.

special importance. Instead, she reduced the factor to an afterthought.

Of the nine *Avis* factors, the closeness of the vote must be recognized as one of the most critical. Logically, the closer the vote, the more likely that objectionable conduct affected the results of the election. Here, ten percent of the bargaining unit did not vote. Given that access to the voting room was effectively blocked by the Union's misconduct for ten minutes at the end of the voting period, the impact of the close vote is magnified. Merely tallying this impact in the Employer's column in a purely numerical analysis does violence to the concept of "reasonable doubt." In truth, the closeness of the election coupled with the egregious nature of the Union's misconduct, is an exemplar of "reasonable doubt" as to the fairness of the election.

C. THE ARD IMPROPERLY DISTINGUISHED EXTANT BOARD LAW

The Employer cited to the Hearing Officer three cases in support of its position that the presence of the Union representatives in the polling area during the vote constituted objectionable conduct. The Hearing Officer found that *Nathan Katz Realty*, 251 F.3d 981 (2001), *Electric Hose and Rubber Co.*, 262 NLRB 186 (1982) and *Performance Measurements Co.*, 148 NLRB 1657 (1964) are distinguishable because "in those cases, the party representative(s) were near the entrance to the voting area for most, if not all, of the voting session." The ARD summarily rejected the Employer's contention that the special circumstances here warranted application of the principles applied in those cases.

The ARD and the Hearing Officer mistake the import of those decisions. The Board does not simply measure the length of time party representatives are present at the polling area. Rather, the Board measures the impact on the election of the misconduct. In a close election such as this, the presence of the Union's representatives for even the span of ten minutes could coerce enough employees into abstaining from the vote as to skew the outcome of the election. One affected

employee would have been enough to change the election results. The ARD's conclusion that the Hearing Officer followed extant Board law is simply wrong.

CONCLUSION

The minimum requirements for a fair Board election should always include free and unimpeded access to the voting area during the entire scheduled length of the election. The Board should harbor reasonable doubt as to the fairness and validity of the election if this requirement is not met. This case presents precisely that scenario. Here, five union representatives congregated directly outside the only entrance to the voting area while the vote was still in progress and effectively blocked access to the voting area. Not content with physically obstructing the voting area, they also initiated a loud, hostile exchange with representatives of the Employer who were drawn to the scene by the disturbance.

Even though the altercation continued for ten minutes until the polls closed; even though ten percent of the bargaining unit failed to vote; and even though one vote could have altered the results of the election, the ARD certified the Union over the Employer's objection. In this respect, the ARD erred. This election drifted far from the pristine laboratory conditions the Board demands for a fair election. For the reasons stated above, the ARD's Decision and Certification of Representative should be vacated, the results of the November 12, 2019 election set aside, and a new election ordered.

Respectfully submitted this 19th day of February, 2020.

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By: */s/ Jonathan J. Spitz*
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Jason B. Malone

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020, I caused the foregoing Request for Review of Acting Regional Director's Decision and Certification of Representative to be filed with the Executive Secretary, National Labor Relations Board, using the CM/ECF system.

I further certify that I caused a copy to be served via electronic mail upon the following:

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/s/ Jonathan J. Spitz
Jonathan J. Spitz

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GADECATUR SNF LLC D/B/A EAST LAKE ARBOR

Employer

and **Case 10-RC-249998**

RETAIL, WHOLESALE & DEPARTMENT STORE UNION - SOUTHEAST COUNCIL

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

I have considered the exceptions filed by GADecatur SNF LLC d/b/a East Lake Arbor (Employer) to the Hearing Officer's Report recommending the Employer's objection be overruled and the Retail, Wholesale & Department Store Union – Southeast Council (Petitioner) be certified as the collective-bargaining representative of the employees of the Employer in the below bargaining unit. Pursuant to Section 102.69 of the Board's Rules and Regulations, I agree with the Hearing Officer's Report as set forth below.

On October 15, 2019, the Petitioner filed the petition in Case 10-RC-249998.[1] Pursuant to a Stipulated Election Agreement, an election was conducted on November 12 in the following unit of employees of the Employer:

> All regular part-time and full-time employees including CNAs, LPNs, Activity and Maintenance employees employed by the Employer at its facility located at 304 5th Avenue, Decatur, Georgia [who were employed by the Employer during the payroll period ending October 25, 2019]; excluding all other employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

The tally of ballots showed that of the approximately 48 eligible voters, 22 cast ballots for the Petitioner and 17 cast ballots against representation. There were 4 challenged ballots. The challenges were not sufficient in number to affect the results of the election. Therefore, the Petitioner received a majority of the votes.

The Employer timely filed three (3) objections. During the post-election hearing, the Employer requested to withdraw Objection 1 and Objection 2, as detailed in the Order Directing Hearing and Notice of Hearing on Objections. The withdrawal of those objections is approved. On December 20, the Hearing Officer issued a report in which she recommended overruling the remaining objection in its entirety. The Employer filed exceptions to the Hearing Officer's Report and a supporting brief, and the Petitioner filed a response brief.

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[1] All dates are in the year 2019 unless otherwise specified.

The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have carefully considered the entire record, including the evidence presented at hearing and the arguments presented by the parties. As discussed below, I agree with the Hearing Officer that the Employer's objection be overruled. Accordingly, I am issuing a Certification of Representative.

I. THE OBJECTION

The Employer's third and remaining objection alleges:

Objection 3: The Petitioner, its agents, or representatives escorted a terminated employee into the voting area and the terminated employee engaged in an outburst. The Employer alleges this conduct intimidated other eligible voters and destroyed laboratory conditions requisite to a free and fair election.

As stated by the Hearing Officer, though the Objection appears to allege third-party misconduct, the Employer clarified its position on the record, stating that the issue is the Petitioner's alleged misconduct during the final polling session.

The Employer alleges that the Petitioner, its agents, or representatives entered the Employer's facility with a discharged employee, stood directly outside the room where the polling was being conducted demanding the discharged employee be allowed to vote, and refused to leave the premises prior to the conclusion of the polling session. The Employer alleges these actions destroyed laboratory conditions requisite to a free and fair election.

For the reasons set forth in the Hearing Officer's Report, I agree with her recommendation to overrule this objection. I now address the Employer's exceptions.

II. BACKGROUND

The Employer operates a skilled nursing facility in Decatur, Georgia. The election took place on November 12 from 6:00 a.m. to 8:00 a.m. and from 2:00 p.m. to 4:00 p.m. at the Employer's facility. The voting occurred in a conference room located along the facility's main hallway on the first floor, approximately 20 feet from the main entrance to the facility. The main entrance is always locked. Employees gain entrance with a door code, and visitors ring a bell and are admitted into the building by an employee at the reception desk. The reception desk is located in the main hallway and faces the main entrance. The business office, where Human Resources and the Administrator's office are located, is at the end of the main hallway, past the conference room where the voting took place. Turning right from the entrance down the main hallway there is a nursing station.

The relevant facts are largely undisputed. On November 12 at about 3:45 p.m., the Employer's receptionist notified Administrator Lesly Gervil and Employer's attorney John Chobor that recently discharged employee Tabatha Martin had accessed the facility. Per

Employer policy, Martin was not allowed in the Employer's facility because she had been discharged. Gervil and Chobor met Martin near the voting area and informed Martin that she could not vote because she had been discharged and that she had to leave the facility immediately. Martin argued that she should be allowed to vote.[2] The confrontation ended when Martin stated she was going to call the Petitioner and left the facility.

Approximately 10 minutes later, at about 3:55 p.m., Martin was admitted into the facility with approximately four Petitioner representatives. Gervil and Chobor met the Petitioner representatives and Martin in front of the reception desk and an argument ensued regarding whether to allow Martin to vote. It is undisputed that individuals from both parties raised their voices. Petitioner representatives and Martin demanded that Martin be allowed to vote; the Employer representatives demanded Martin leave the premises or they would call the police.

The Employer presented evidence via Administrator Gervil's testimony that employees throughout the facility came to the area to see what was going on, but no specific evidence was introduced to indicate how many eligible voters were present or which specific eligible voters witnessed the verbal altercation. No other witnesses corroborated Gervil's testimony that eligible voters witnessed the verbal altercation between the Employer representatives and Petitioner representatives. Both Gervil and Martin testified that they did not see anyone enter, leave, or approach the voting room during the time that the Petitioner and Employer argued about whether Martin would be allowed to vote.

During the argument, the parties drifted down the hallway until they were standing directly outside the door to the conference room where the voting took place. At about 4:00 p.m. the Board agent opened the door to announce the polls were closed. At that time, the parties agreed to allow Martin to vote subject to challenge. Martin cast her ballot and left the facility.

III. SUMMARY OF FINDINGS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). The Employer, as the party filing objections, has the burden of showing by specific evidence that the alleged improprieties occurred, including every aspect of its prima facie case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282,

[2] On November 5, 2019, the Petitioner Union filed an unfair labor practice charge in Case 10-CA-251187 alleging that Tabatha Martin and another employee were discharged on November 4, 2019, in violation of Section 8(a)(3) of the Act. The charge was pending investigation at the time of the election.

282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. Neither evidence of subjective impact upon employees nor conclusory evidence is material to an analysis of objectionable conduct. *Lake Mary Health and Rehabilitation*, 345 NLRB 544, 545 (2005); *Picoma Industries, Inc.*, 296 NLRB 498, 499 (1989). The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but "... whether the conduct had a reasonable tendency to interfere with employees' free choice to such an extent that it materially affected the results of the election." *Madison Square Garden Ct, LLC*, 350 NLRB 117, 119 (2007). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

When analyzing whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

The Hearing Officer concludes in her report, and I agree, that the Petitioner's alleged misconduct did not reasonably tend to interfere with voters' free choice in the election for the following reasons. Seven of the nine factors listed above weigh against setting the election aside and therefore outweigh the remaining two factors that could lean in favor of rerunning the election.

First, there was only one incident, occurring within the last five minutes of the final polling session. Second, the incident lacked severity. The incident was short in duration and was unlikely to cause fear among employees as the argument centered around whether a discharged employee could vote and did not involve any other subject matter. Third, there is no specific evidence as to how many eligible voters witnessed the incident, and the only evidence that any eligible voters were subjected to the alleged misconduct is in the form of vague, uncorroborated testimony. Fourth, the degree to which the misconduct persisted in the minds of the voters is not an issue here as the election was over immediately after the incident. Fifth, there was no chance for the misconduct to disseminate to the voting unit and impact voters' preferences because the

election ended immediately after the incident. Sixth, the record establishes that representatives for both the Employer and the Petitioner engaged in the same potential misconduct as each took part in a verbal altercation directly outside the polling area while the polls were open. Seventh, the alleged misconduct can be partially attributed to the Employer as the Employer's refusal to allow an eligible voter access to the polling location to vote subject to challenge precipitated the incident.

The Hearing Officer did find that the proximity of the alleged misconduct to the date of the election could weigh in favor of setting the election aside because it occurred during approximately the final five minutes of the election. The Hearing Officer also considered the closeness of the final vote tally (48 eligible voters, 22 for the Petitioner, 17 against representation, and 4 challenged ballots) in weighing whether the election should be set aside. However, when considering all nine factors, the evidence establishes the alleged misconduct did not have a reasonable tendency to interfere with employees' free choice and therefore does not warrant setting aside the election.

IV. THE EXCEPTIONS

The Employer filed 31 exceptions to the Hearing Officer's Report, which it briefed under six main headings: (A) the Hearing Officer erred in finding the altercation was not sufficiently severe, did not likely cause fear among employees in the voting unit, and did not reasonably tend to interfere with the voters' free choice in the election; (B) the close margin of the final tally of ballots supports setting aside the election; (C) the credible record evidence establishes eligible voters saw the altercation; (D) the Hearing Officer failed to apply two of the *Avis Rent-a-Car* factors, which support setting aside the election; (E) representatives for the Employer and Petitioner did not engage in the same misconduct which, in any event, is not material; and (F) the Hearing Officer erroneously distinguished Board cases that dictate the election be overturned.

Using the Employer's headings, I will address the 31 exceptions as grouped by the Employer in its brief.

A. The Hearing Officer Erred in Finding the Altercation was not Sufficiently Severe, Did Not Likely Cause Fear Among Employees in the Voting Unit, and Did Not Reasonably Tend to Interfere with the Voters' Free Choice in the Election

The Employer contends the Hearing Officer's determination that the altercation was not "severe," did not cause fear among employees in the voting unit, and did not reasonably tend to interfere with voters' free choice in the election was in error. Specifically, the Employer takes issue the Hearing Officer's characterization of the altercation as lasting "approximately five minutes" and asserts instead the altercation lasted as long as ten minutes. However, as the Hearing Officer correctly noted, multiple witnesses, including the Employer's witness Administrator Gervil, testified that the altercation lasted around five minutes until the end of the polling period. However, even if the altercation had lasted ten minutes, this brief time period weighs against the "severity" of the altercation. Further, as the Hearing Officer noted, the subject

of the altercation was a discharged employee's eligibility to vote, and the Employer cites no authority for finding that such a dispute would create fear among employees in the voting unit.

The Employer's primary argument in this section is that the Hearing Officer failed to consider how the altercation and the Employer and Petitioner representative blocking access to the polling place could have affected eligible voters' ability and desire to cast a ballot. However, the Hearing Officer specifically considered this possibility and noted in her report that there was no evidence presented at the hearing that any eligible voter who had not already voted was witnessed the altercation. Further, the Hearing Officer noted that the Employer was unable to provide specific evidence as to whether any eligible voters at all had witnessed the altercation (regardless of whether they had cast a ballot).

I find that the record supports the Hearing Officer's analysis of these facts and agree with her conclusion that the roughly five-minute altercation between Employer and Petitioner representatives was not "severe," did not cause fear among employees in the voting unit, and did not reasonably tend to interfere with the voters' free choice in the election.

B. The Close Margin of the Final Tally of Ballots Supports Setting Aside the Election

The Employer asserts that the Hearing Officer erred by failing to adequately consider the closeness of the final tally of ballots in deciding whether the altercation could have affected the outcome of the election. As the Employer correctly notes, of the 48 eligible voters, only 43 voters cast ballots meaning there were 5 eligible voters who did not vote. Because of the closeness of the final count (22 votes for the Union, 17 against, 4 challenged ballots), just 1 more ballot cast could have affected the final count and made the challenged ballots determinative. The Employer relies on two Board cases to support its contention that the closeness of this election means the alleged misconduct should require a rerun election: *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) and *Cambridge Tool & Mfg.*, 316 NLRB 716, 716 (2000). However, in both of those cases, the evidence clearly indicated that the objectionable conduct was directed at and affected eligible voters. Those cases may be distinguished from the instant case in which the Employer did not provide sufficient evidence to support a finding that eligible voters witnessed the altercation and could have been affected by it.

The Hearing Officer considered the closeness of the final tally of ballots in weighing the *Avis Rent-a-Car* factors. However, no single factor is determinative, and most of the *Avis Rent-a-Car* factors weigh in favor of not rerunning the election. I find the record supports the Hearing Officer's analysis and agree with her conclusion that the close margin of final tally of ballots is not sufficient to support setting aside the election.

C. The Credible Record Evidence Establishes Eligible Voters Saw the Altercation

Per established policy, the Board does not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence indicates the hearing officer is incorrect. *Stretch-Tex*, 118 NLRB at 1361 (1957). The Hearing Officer noted that there

was no evidence presented that any eligible voter who had not already voted witnessed the altercation. The Employer asserts it is sufficient evidence that the misconduct occurred in a main area and thus *could* have been visible to anyone in the main hallway, nursing station, near the dining room, or near the breakroom. The Employer notes Administrator Gervil's "uncontroverted" testimony that multiple eligible voters from the second floor and down the hallway came closer to the altercation and therefore witnessed it. The Employer argues it is reasonable under these circumstances that an eligible voter might have avoided the area and chosen not to cast a ballot.

However, Administrator Gervil's testimony on this matter was not specific, and the Hearing Officer did not credit it. Gervil could not identify which or how many eligible voters witnessed the altercation. No additional evidence corroborated Gervil's testimony that other eligible voters witnessed the altercation, and the Employer called no witnesses to testify that any specific eligible voter was unable to vote or intimidated from voting due to the altercation. Therefore, I find the record supports the Hearing Officer's analysis and agree with her conclusion that there is insufficient evidence to support the Employer's assertion that eligible voters witnessed the altercation.

D. The Hearing Officer Failed to Apply Two of the *Avis Rent-a-Car* Factors, Which Support Setting Aside the Election

The Employer argues that the Hearing Officer failed to apply two of the *Avis Rent-a-Car* factors – namely the "persistence of the misconduct in the minds of the employees" and the "dissemination of the misconduct throughout the voting unit." However, the Employer's own brief notes that the Hearing Officer did in fact consider these factors and she determined they did not weigh in favor of setting aside the election because of the short duration of the altercation and the timing of the altercation in relation to the when the polls closed. The Employer's actual argument appears to be that it believes the altercation could have disseminated throughout the voting unit and the altercation could have "persisted" in the minds of voters. However, these arguments only have merit if there was actual evidence that eligible voters who had not already cast a ballot witnessed the altercation, and as discussed above, I agree with the Hearing Officer's findings on that point.

Therefore, I find the record supports the Hearing Officer's analysis and agree with her conclusions in finding that two of the *Avis Rent-a-Car* factors (the degree to which the misconduct persists in the minds of employees in the voting unit and the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit) did not weigh in favor of setting aside the election.

E. Representatives for the Employer and Petitioner Did Not Engage in the Same Misconduct Which, in any Event, is Not Material

The Employer argues that the Hearing Officer erred in finding that both the Employer and the Petitioner engaged in the same potential misconduct. The Employer asserts that by failing to leave the premises after the Employer's agents requested this, the Petitioner's agents

essentially became trespassers, and therefore Petitioner's refusal to leave created an appearance that the Employer was "powerless to protect its own legal rights in a confrontation with the Union." *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991).

In *Phillips Chrysler Plymouth*, two union organizers remained on the Employer's shop floor for 45 minutes engaging in electioneering conduct and remained there despite the employer's repeated requests to leave and in spite of the eventual arrival of police. The Board reasoned that this conduct made it appear as though the employer had no power to confront the union. Those facts are completely distinguishable from the case at hand. In this case, the Employer did in fact confront the Petitioner, leading to the raised voices at the center of this altercation. The Petitioner's agents remained at the Employer's facility for only approximately five minutes, did not engage in any electioneering, and there was no police confrontation. Furthermore, the Hearing Officer correctly noted that the Employer participated in the altercation, and it is not immaterial that the altercation was partially caused by the Employer's refusal to allow an eligible voter to vote.

The Employer's objection is that Petitioner's agents loudly argued with Employer's agents about whether a discharged employee could vote, and this all took place in an area potentially blocking access to the polling place. It is undisputed that the Employer's agents also raised their voices and stood in the same general area as Petitioner's agents. Thus, both parties engaged in the same type of conduct and taking that into consideration in determining whether the laboratory conditions were maintained is proper.

Therefore, I find the record supports the Hearing Officer's analysis and agree with her conclusions that representatives for both parties engaged in the same potential misconduct and this factor weighs against setting aside the election.

F. The Hearing Officer Erroneously Distinguished Board Cases that Dictate that the Election be Overturned.

The Employer asserts the Hearing Officer erroneously distinguished *Nathan Katz Realty*, 251 F.3d 981 (2001), *Electric Hose and Rubber Co.*, 262 NLRB 186 (1982) and *Performance Measurements Co.*, 148 NLRB 1657 (1964) from the case at hand when making her decision. However, the Employer's arguments to support this assertion again rely on the same arguments made in the exceptions discussed above, primarily whether the Petitioner's actions affected any eligible voters who had not cast a ballot. Having already considered those arguments earlier and noting that the Hearing Officer properly applied extant Board law, and I find the Employer's contention without merit.

V. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's report and recommendations, and the exceptions and arguments made by the parties, I find the Employer has not met its burden of establishing that the alleged conduct interfered with the results of the election nor destroyed laboratory conditions requisite to a free and fair election.

Therefore, I overrule the Employer's objection and I shall certify the Petitioner as the representative of the appropriate bargaining unit.

VI. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for the Retail, Wholesale & Department Store Union – Southeast Council, and that it is the exclusive representative of all the employees in the following bargaining unit:

> All regular part-time and full-time employees including CNAs, LPNs, Activity and Maintenance employees employed by the Employer at its facility located at 304 5th Avenue, Decatur, Georgia; excluding all other employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

VII. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by February 19, 2020. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: February 4, 2020

Lisa Y. Henderson
Acting Regional Director
National Labor Relations Board, Region 10
233 Peachtree St NE
Harris Tower Ste 1000
Atlanta, GA 30303-1504

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GADECATUR SNF LLC D/B/A EAST LAKE ARBOR

Employer

and **Case 10-RC-249998**

RETAIL, WHOLESALE & DEPARTMENT STORE UNION - SOUTHEAST COUNCIL

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

On October 15, 2019, the Retail, Wholesale & Department Store Union – Southeast Council (Petitioner) filed a petition in Region 10 - Atlanta, Georgia.[1] Pursuant to a Stipulated Election Agreement approved on October 28, an election by secret ballot was conducted on November 12 among employees in the bargaining unit stipulated to be appropriate to determine the question concerning representation. The appropriate unit is:

> All regular part-time and full-time employees including CNAs, LPNs, Activity and Maintenance employees employed by the Employer at its facility located at 304 5th Avenue, Decatur, Georgia; excluding all other employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 48 eligible voters, 22 cast valid votes for and 17 cast valid votes against the Petitioner. There were 4 challenged ballots and 0 void ballots. The challenged ballots were not sufficient in number to affect the results of the election. On November 19, GADecatur SNF LLC d/b/a/ East Lake Arbor (Employer) timely filed objections to conduct affecting the results of the election and a copy thereof was duly served upon the Petitioner. Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the issues raised by the objections was conducted and on November 26 the Acting Regional Director issued an Order Directing Hearing and Notice of Hearing on Objections directing that the objections be resolved by record testimony.

Pursuant to the Acting Regional Director's order, a hearing was conducted on December 4 in Atlanta, Georgia before the undersigned hearing officer duly designated for that purpose. All parties were afforded the full opportunity to participate, to examine and cross-examine witnesses and to produce evidence bearing on the issues. The parties submitted oral arguments on the record, which have been duly considered.

I have considered the entire record in this case carefully. My findings herein are based upon exhibits, testimony, and my observation of the witnesses who testified. I have made determinations

[1] All dates are in the year 2019 unless otherwise specified.

of credibility based on general demeanor, partisan and monetary interest, guarded or indirect answers, conclusional testimony as distinguished from fact, self-serving answers, answers to leading questions on direct examination, general memory for details, the ability to comprehend questions, the internal and external consistencies in the testimony and the inherent probability of events. Where deemed necessary herein, I shall note my specific credibility findings and the reasons therefor. Testimony judged patently incredible or unworthy of belief may not be discussed or subject to comment. Accordingly, any failure to detail all conflicts in evidence does not mean that such conflicting evidence was not considered.

WITHDRAWAL REQUEST

During the hearing, the Employer requested to withdraw Objection 1 and Objection 2, as detailed in the Order Directing Hearing and Notice of Hearing on Objections. (Bd. Ex. 1(e).) I recommend that the Employer's withdrawal request be approved.

OBJECTIONS

As set forth more fully below, I recommend that the remaining Objection be overruled. As a majority of the valid votes counted were cast in favor of Petitioner, I further recommend certification of Petitioner as the collective-bargaining representative of the employees of the Employer in the appropriate collective-bargaining unit.

> **Objection 3:** The Petitioner, its agents, or representatives escorted a terminated employee into the voting area and the terminated employee engaged in an outburst. The Employer alleges this conduct intimidated other eligible voters and destroyed laboratory conditions requisite to a free and fair election.

While the Objection appears to allege third-party misconduct, the Employer clarified its position on the record, stating that the issue is the Petitioner's alleged misconduct during the final polling session. The Employer stated the Petitioner, its agents, or representatives entered the Employer's facility with a discharged employee, stood directly outside the room where the polling was being conducted demanding the discharged employee be allowed to vote, and refused to leave the premises prior to the conclusion of the polling session. The Employer alleges these actions destroyed laboratory conditions requisite to a free and fair election.[2] This objection involves events that occurred during the final polling session, shortly before the polls closed.

FACTS

The Employer operates a skilled nursing facility in Decatur, Georgia. The election was held on November 12 at the Employer's facility. There were two polling sessions, which took place

[2] The record indicates that the Employer's objection is based on the Petitioner's alleged misconduct rather than any alleged misconduct on the part of the third-party, discharged employee. However, I would make the same recommendation to overrule the objection even if the Employer

from 6:00 a.m. to 8:00 a.m. and from 2:00 p.m. to 4:00 p.m. The voting took place in a conference room located along the facility's main hallway on the first floor, approximately 20 feet from the main entrance to the facility. The main entrance is locked. Employees gain entrance with a door code while visitors ring a bell and are admitted into the building by an employee at the reception desk. The reception desk is located in the main hallway and faces the main entrance. The business office, where Human Resources and the Administrator's office are located, is at the end of the main hallway, past the conference room where the voting took place. Turning right from the entrance down the main hallway there is a nursing station.

The record established that Tabatha Martin was employed by the Employer during the Petitioner's campaign and was discharged on about November 4. An unfair labor practice charge was filed related to Martin's discharge prior to the election. At the time of her discharge Martin was included on the voter eligibility list as an eligible voter.[3]

The relevant facts are largely undisputed. The Employer's facility administrator, Lesly Gervil, and former employee Tabatha Martin testified regarding the relevant events.[4] On November 12 at about 3:45 p.m. the Employer's receptionist notified Administrator Gervil and the Employer's attorney, John Chobor, that Martin had accessed the facility. Gervil testified that as a discharged employee, Martin was not allowed in the Employer's facility. Gervil and Chobor met Martin near the voting area and informed Martin that she could not vote because she had been discharged and that she had to leave the facility immediately. Martin argued, stating that she should

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based its objection on third-party misconduct. None of third-party Tabatha Martin's alleged misconduct rises to the standard applied to third-party misconduct of being "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel,* 270 NLRB 802, 803 (1984). The standard for third-party conduct is more difficult to meet because conduct of third parties tend to have less effect upon voters, and because unions and employers cannot control non-agents. See *Mastec Direct TV*, 356 NLRB 809, 811 (2011) and *Lamar Advertising of Janesville,* 340 NLRB 979, 980 (2003).

[3] Martin should have been allowed to vote, subject to challenge, as she was employed in the appropriate unit on the established eligibility date and had filed an unfair labor practice charge related to her discharge at the time of the election. To be eligible to vote in a Board election, the employee must be in the appropriate unit (1) on the established eligibility date, which is normally during the payroll period immediately preceding the date of the direction of election, or election agreement, *and* (2) in employee status on the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969); *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835, 842 (8th Cir. 1968); *Beverly Manor Nursing Home*, 310 NLRB 538, 538 fn. 3 (1993). As a general rule, a discharge is presumed to be for cause unless a charge has been filed and is pending concerning the discharge. In such a case, the employee votes under challenge. *Dura Steel Co.*, 111 NLRB 590, 591–592 (1955).

[4] Both Gervil and Martin, as well as another employee witness, testified about Martin's initial attempt to vote. While some of this testimony is briefly discussed as foundation for the subsequent verbal altercation between representatives of the Petitioner and the Employer, it is largely irrelevant to the Employer's objection. Therefore, the interaction between Martin and the Employer's representatives during her initial attempt to vote will not be discussed in detail.

be allowed to vote. The confrontation ended when Martin stated she was going to call the Petitioner and left the facility.

Approximately 10 minutes later, at about 3:55 p.m., Martin was admitted into the facility with approximately four Petitioner representatives.[5] Gervil and Chobor met the Petitioner representatives and Martin in front of the reception desk and an argument regarding whether to allow Martin to vote ensued. It is undisputed that individuals from both parties raised their voices. Petitioner representatives and Martin demanded that Martin be allowed to vote; the Employer representatives demanded Martin leave the premises or they would call the police.

Gervil testified that employees throughout the facility came to the area to see what was going on. However, on cross-examination Gervil admitted that, other than the Petitioner representatives and Martin, he could only recall Chobor being present. Gervil stated he was pretty sure the reception desk employees were present and that it was possible that other employees were present as well. Gervil testified that he knew some LPNs and CNAs (eligible voters) witnessed the commotion but could not recall which specific eligible voters were present, nor could he estimate how many eligible voters were present. No other witnesses were called to corroborate Gervil's testimony that eligible voters witnessed the verbal altercation between the Employer representatives and Petitioner representatives. Both Gervil and Martin testified that they did not see anyone enter, leave, or approach the voting room during the time that the Petitioner and Employer argued about whether Martin would be allowed to vote.

During the argument, the parties drifted down the hallway until they were standing directly outside the door to the conference room where the voting took place. At about 4:00 p.m. the Board agent opened the door to announce the polls were closed. At that time, the parties agreed to allow Martin to vote subject to challenge. Martin cast her ballot and left the facility.

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

The Employer, as the party filing objections, has the burden of showing by specific evidence that the alleged improprieties occurred, including every aspect of its prima facie case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984). An adverse inference may be drawn when a party fails to question a witness about matters that would normally be thought reasonable where such an omission does not appear unintentional. *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977). Neither evidence of subjective impact upon employees nor conclusional evidence is material to analysis of objective conduct. *Picoma Industries, Inc.*, 296 NLRB 498 (1989).

[5] During testimony, witnesses testified that Martin and the Petitioner representatives entered the facility approximately five minutes before the end of the polling session. At various times during their testimonies, the time estimates ranged from five minutes prior to the polls closing to 10 minutes prior to the polls closing. However, both Gervil and Martin consistently estimated the time to be about five minutes prior to the polls closing. Therefore, I find that Martin and the Petitioner representatives entered the facility at approximately 3:55 p.m.

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB 637 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997) (overruling employer's objection where there was no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

ANALYSIS AND RECOMMENDATION

Applying the above factors to the instant case I find that the Petitioner's alleged misconduct did not reasonably tend to interfere with the voters' free choice in the election for the following reasons. First, there was only one incident, occurring within the last five minutes of the final polling session. The incident was not severe as it was short in duration and, while it is undisputed that both parties raised their voices, an argument between the parties regarding whether a discharged employee is allowed to vote is unlikely to cause fear among employees in the voting unit. The Employer's witness testified that other employees witnessed the altercation. However, Gervil was unable to identify which eligible voters were present, or even how many were present.

Additionally, the Employer did not provide any additional witnesses or evidence to support Gervil's statement that employees witnessed any part of the altercation with the Petitioner's representatives. The alleged misconduct occurred during the final approximately five minutes of the election. The degree to which the misconduct persisted in the minds of the voters is irrelevant here, as the election was over immediately following the altercation. Therefore, the misconduct did not impact voters' preferences. Here the record establishes that representatives for both the Employer and the Petitioner engaged in the same potential misconduct. Both parties engaged in a verbal altercation directly outside the polling area while the polls were open. The final vote was close, with the Petitioner winning by five votes but with four uncounted challenged ballots. Finally, while it is undisputed that the Petitioner participated in the altercation, it is unlikely that the altercation would have happened at all if the Employer had allowed the eligible voter access to the polling location in order to vote subject to challenge.

Some of the Board's factors, such as proximity of the misconduct to the election date, and the closeness of the final vote weigh in favor of setting aside the election in the instant case. However, those factors are balanced by the lack of evidence supporting the Employer's assertion that eligible voters decided not to vote in the election, or were prevented from voting, after witnessing the altercation. Further, the misconduct was limited to a single instance of limited severity and time. Employer representatives engaged in the same misconduct at the same time, which, to at least some extent, cancels out the effect of the Petitioner's misconduct. The "persistence of the misconduct in the minds" of the voters and the extent of dissemination of the misconduct are not factors in the instant case because the election ended at approximately the same time the altercation between the parties ended.

The Employer's first argument that Petitioner's conduct likely dissuaded voters from casting ballots is not supported by the record evidence. First, there is no evidence that any eligible voter, who had not already voted, was present to witness the altercation. Gervil testified that eligible voters witnessed the altercation, but he could not identify which, or even approximately how many, voters were present. There was no testimony or evidence presented that any eligible voter was unable to vote or intimidated away from voting due to the alteration between the parties. The altercation was of limited duration, during the final five minutes of the election where approximately 90 percent of the eligible voters cast ballots. Finally, both Gervil and Martin testified that they did not see anyone enter, leave, or even approach the door to the room where the voting occurred.

The Employer cites *Nathan Katz Realty*, 251 F. 3d. 981 (2001); *Electric Hose and Rubber Co.*, 262 NLRB 186 (1982); and *Performance Measurements Co.*, 148 NLRB 1657 (1964) as cases where the mere presence of a party representative near the entrance of the voting area was enough to justify setting aside the election. However, the instant case is distinguished from the cases cited by the Employer because in those cases the party representative(s) were near the entrance to the voting area for most, if not all, of the voting session. Indeed, in *Performance Measurements Co.*, the Board explicitly stated that "brief forays into the election area alone may not tend to interfere with the free choice of the employees...." *Id.* at 1659. In that case, the Board held that it was the "persistent presence" of the employer representative where employees had to pass in order to enter the polling area that was improper. In the instant case, the record evidence established that the

Petitioner's representatives were only present for a few minutes at the end of one session, not a persistent presence.

The Employer also cites *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), for the proposition that the Petitioner's actions would have conveyed a message to employees that the Employer was powerless to protect its own legal rights in a confrontation with the Petitioner. I find that case distinguishable from the facts in the case at hand. In *Phillips Chrysler*, the two union agents refused to leave the employer's work area prior to the beginning of the election. The Board found that the incident was a "major one that continued for some time" and that it took place in front of employees. *Id.* The Board also found that if the incident was not directly witnessed by all 10 unit employees then it was quickly disseminated to all. *Id.* In the case at hand, the incident was not a "major one" nor did it "continue for some time." Furthermore, there is insufficient evidence to conclude that any eligible voters directly witnessed the incident or that any dissemination occurred prior to the closing of the polls.

Applying the standards set forth above, I find that the Employer has failed to establish that the Petitioner's misconduct interfered with the employees' free and uncoerced choice necessitating setting aside the election. Accordingly, Objection 3 is without merit and I recommend it be dismissed.

CONCLUSION

Having fully considered the allegations, I find that the Employer's Objection 3 raises no material or substantial issues affecting the results of the election and hereby recommend that it be overruled. As a majority of the valid votes counted were cast in favor of the Petitioner, I further recommend certification of the Petitioner as the representative of the employees of the Employer in the appropriate collective-bargaining unit.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 10 by January 8, 2020. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Region 10, 233 Peachtree Street NE, Harris Tower Ste 1000, Atlanta, GA 30303-1504.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business at 4:30 p.m. on the due date. If E-Filed, it will be considered timely if the transmission of the entire document

through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: December 20, 2019

/s/ Kami Kimber
Kami Kimber, Hearing Officer
National Labor Relations Board
Region 10
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